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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

CARLOS D. PERALEZ,

Defendant and Appellant.

B174141

(Los Angeles County
Super. Ct. No. TA070930)

APPEAL from a judgment of the Superior Court of Los Angeles County. William R. Chidsey, Jr., Judge. Affirmed in part, vacated in part and remanded for resentencing.

Adam Axelrad, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Marc E. Turchin and William T. Harter, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant, Carlos D. Peralez, appeals his convictions for willfully inflicting corporal injury on a cohabitant and for assault by means of force likely to cause great bodily injury. He contends the trial court's ruling permitting law enforcement officers to testify to statements the victim made through an interpreter violated the rules of evidence regarding the admission of hearsay. We conclude in the overall circumstances of this case the translated statements can be fairly considered those of the victim and thus do not constitute hearsay. Accordingly, we affirm appellant's convictions. However, we agree with appellant's assertions of sentencing error. We thus vacate his sentence and remand the matter to the trial court for resentencing.

FACTS AND PROCEEDINGS BELOW

Beatriz Caballero had been living with appellant as boyfriend and girlfriend for about three years. For the past six months they had been living together on the streets. Previously they had lived in a motor home and before that in a home in Lynwood.

On the night of May 28, 2003, Caballero was severely beaten. One of her teeth was knocked out and her mouth was bleeding. She had a cut under her eyebrow. The blood vessels in her right eye were broken.

The jury heard two versions of how these injuries occurred.

Caballero testified she was an alcoholic. On May 28, 2003, she had been drinking all day and was very drunk. She got into a fight with a Black woman over beer. After the fight Caballero went looking for appellant. She found appellant standing outside his ex-wife's house in Lynwood. Appellant had his daughter drive Caballero to her daughters' nearby home also in Lynwood.

Caballero was angry appellant did not come with her but chose to stay at his ex-wife's house instead. She told her daughters, Erica and Sandy, it was appellant who had beaten her. Caballero was crying and drunk. Her elder daughter, Erica, told Caballero she was going to call the police. Caballero told Erica, "Well, do what you want."

Erica, according to Caballero, speaks both Spanish and English fluently. Caballero speaks only Spanish. Erica called the police. An officer arrived a few minutes later. The police officer asked Caballero questions and Caballero answered through Erica who translated for her. Caballero testified she tried to tell the officer she had lied about appellant hitting her. However, she claimed neither Erica nor the officer would listen to her.

The officer drove Caballero and Erica to the location where Caballero had last seen appellant. Appellant was still outside his ex-wife's house talking to his daughter. Caballero wanted to tell the police it was a lie, but then an officer handcuffed appellant's daughter and told Caballero if she would not shut up, police would arrest her as well. She more or less understood what the officer said in English. No officer asked her to identify appellant.

Caballero spent the night at her daughters' house. The next day a police officer telephoned. Erica, not she, spoke to the officer. Police officers arrived at the house and took pictures of Caballero's injuries. She agreed the photographs depicting her with a missing tooth, bloody mouth, bloody eye and a cut beneath her right eyebrow accurately represented how she looked the day after her beating. However, Caballero denied she had slept in the bed which photographs showed had red spots on the pillow and sheets. Caballero identified a photograph of a blouse she had worn the day she was beaten which appeared to be covered in blood. Caballero said when she got into the fight with the woman, her mouth started bleeding and the blood on her blouse was from her mouth. Caballero explained she has gum disease and her gums tend to bleed very easily.

Caballero told a person (who turned out to be the original prosecutor in the case) she was lying when she said it was appellant who had hit her. This person told Caballero she could be arrested for telling lies. After this discussion Caballero did not come to court and did not talk to anyone associated with the case. She instead prepared a written statement explaining she only told her daughters appellant had hit her because she was angry with him. Her written statement explained she tried to tell people it was not true he had hit her but no one would listen to her. After this person told her she could be arrested

for lying, she was afraid to come to court for having lied about appellant hitting her. She was afraid she would be arrested or deported.

The day before her trial testimony a different district attorney investigator drove her and her daughter Sandy home from court. Caballero stated the investigator was fluent in Spanish. Caballero testified the investigator asked her questions about the case. She claimed she told the investigator she and appellant had had arguments like any couple. However, she denied telling the investigator she had been bloodied that day because appellant had hit her.

Caballero wrote to appellant in jail several months before the trial. In her letter, Caballero expressed her love for him and expressed regret for her actions. She apologized for all the grief she had caused him by her lies. Caballero stated how much she loved him and how much she wanted to be with him again. In her letter, Caballero referred to appellant as the “love of her life” and told him she would love him forever.

The rest of the prosecution witnesses related a different version of the events.

Caballero’s other daughter is Sandy Jimenez. She testified she was at the house with Erica on May 28, 2003, when their mother arrived. According to Jimenez, Caballero was “[t]ore up, all beat up.” Caballero looked scared. She was bleeding from her mouth and had a cut over her eye. Caballero explained appellant had hit her. Afterward police came to the house. Sandy did not personally get involved with the police because her older sister Erica was “taking care” of things.

Sandy identified a photo of the bed with the bloody bed linens. She testified it was her brother’s bed where she saw Caballero sleep the night she received her injuries.

An investigator from the district attorney’s office drove Jimenez and Caballero home from court the day before Jimenez’s testimony. He spoke to both of them in fluent Spanish. However, Jimenez did not really pay attention to his conversation with her mother.

Los Angeles County Deputy Sheriff Steven Kendall was the first officer to respond to Erica’s 911 call. He arrived at the house in Lynwood around 10:20 in the evening. Caballero seemed upset. She was crying and holding a Kleenex to her bloody

mouth. He asked Caballero what happened. However, he did not speak Spanish and she did not speak English. Caballero's daughter, Erica, translated the officer's questions into Spanish and her mother's answers into English. Through her daughter, Caballero stated she had been assaulted. She said appellant had punched her in the face three or four times with a closed fist. Caballero stated the assault occurred on Norton Avenue in Lynwood, at appellant's ex-wife's house. Caballero stated she did not need the deputy to call the paramedics.

Caballero, Erica and the officer drove in the deputy's patrol car to appellant's ex-wife's house. Appellant was sitting on the porch outside the house talking to his daughter. Erica pointed appellant out to the officer. The officer then asked Erica to ask Caballero whether appellant was the person who had punched her in the mouth. According to the deputy, Caballero said "yes," and pointed to appellant.

The two women waited in the car as the deputy talked to appellant. The deputy noticed what appeared to be dried blood on the knuckles and fingers of appellant's right hand.

Appellant's daughter refused the deputy's orders to stop interfering with his investigation. A backup deputy handcuffed appellant's daughter and placed her in his patrol car. Caballero and her daughter Erica remained seated in Deputy Kendall's patrol car. Deputy Kendall testified Caballero never got out of his patrol car and he had no occasion to tell her to be quiet or he would arrest her too.

Deputy Kendall did not take photos of Caballero's injuries or of the blood on appellant's right hand.

Los Angeles County Sheriff's Detective Robert Reed investigated the case. He telephoned Caballero the next day. He spoke with her daughter Erica because he did not speak Spanish. He interviewed Caballero by posing questions to Erica to ask her mother. After he asked a question he could hear Erica speaking to Caballero in a foreign language, and then hear Caballero responding in a foreign language. Erica relayed Caballero's translated response to the detective in English. In this interview Caballero confirmed the factual details of Deputy Kendall's written report. Through Erica,

Detective Reed asked Caballero whether she was afraid of appellant. Caballero responded she was. Detective Reed inquired whether she nevertheless wanted to prosecute a case against him. Again, through Erica, Caballero stated she wanted appellant prosecuted.

Detective Reed came to the house and took photographs of Caballero's injuries, of the bloody blouse she wore the day before, and of the bloodied linens on the bed in which she had slept the night before.

Jess Gomez is a supervising investigator for the Los Angeles County District Attorney's Office. He testified the usual investigator was not available to transport Caballero and Sandy home from court the day before their testimony. He drove them home instead. Gomez is a native Spanish speaker and he decided to talk to Caballero in the hopes she would say something about the case. Caballero and Sandy both sat in the back seat. Initially, Caballero said little in response to Gomez's questioning. However, she began to open up when Gomez started asking her about her relationship with appellant. Ultimately, Caballero told Gomez she and appellant had both been drinking that day and were drunk. They had an argument about something and appellant hit her in the nose with his hand. Gomez asked Caballero whether she still had feelings for appellant. Caballero stated she was not sure how she felt. Caballero said she was not frightened about testifying, she just did not want to have anything to do with appellant any more.

Appellant called as a defense witness the prosecutor who was initially assigned the case. According to the prosecutor's notes, Caballero told her she had lied when she said appellant had hit her. Caballero told the prosecutor it was instead a person called "little skinny" who had hit her. The prosecutor testified she dealt with domestic violence cases nearly every day and had no specific recollection of Caballero, or of this case. The prosecutor testified it was not her style to threaten a recanting witness with arrest for perjury. On the other hand, she has often told a recanting domestic violence victim she did not believe her.

An information charged appellant with willfully inflicting corporal injury on a cohabitant,¹ and with assault by means of force likely to produce great bodily injury.² The jury found him guilty as charged. In a bifurcated proceeding the court found true the special allegations appellant had suffered two prior serious or violent felonies within the meaning of the Three Strikes law,³ had served three prior prison terms,⁴ and on conviction of the current offenses was subject to five-year enhancements based on his prior serious or violent felony convictions.⁵

The court denied appellant's motion for new trial. However, it granted his request to strike one of his prior "strike" convictions⁶ and sentenced him as a second "strike" offender. The court imposed a four-year term, doubled to eight and added a one-year term for having served a prior prison term, for an overall sentence of nine years in state prison. The court imposed and stayed punishment on the remaining count and special allegations.

Appellant appeals from the judgment of conviction.

DISCUSSION

I. CABALLERO'S TRANSLATED STATEMENTS WERE PROPERLY ADMITTED.

Appellant argues the trial court prejudicially erred in allowing the law enforcement officers to testify to Caballero's extrajudicial statements regarding how she received her injuries. He contends Caballero's daughter Erica was not acting as a true

¹ Penal Code section 273.5, subdivision (a). All further statutory references are to the Penal Code unless otherwise noted.

² Section 245, subdivision (a)(1).

³ Section 1170.12, subdivisions (a) through (d) and section 667, subdivisions (b) through (i).

⁴ Section 667.5, subdivision (b).

⁵ Section 667, subdivision (a)(1).

⁶ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

language conduit and thus her translation of Caballero's statements as testified to by the officers constituted impermissible hearsay.⁷

In *Correa v. Superior Court*,⁸ the California Supreme Court considered the question whether a translator added a layer of hearsay when a law enforcement officer testified to translated statements at a preliminary hearing.

The *Correa* court reviewed numerous decisions of this state and from other jurisdictions. These decisions employed different analyses but found in most instances translated out of court statements could properly be considered those of the declarant. Thus, the court observed the weight of authority "did not treat the participation of a translator in such circumstances as interposing a layer of hearsay. Rather, a generally unbiased and adequately skilled translator simply serves as a 'language conduit,' so that the translated statement is considered to be the statement of the original declarant, and not that of the translator."⁹

The California Supreme Court adopted the "language conduit" theory enunciated by the Ninth Circuit Court of Appeals in *United States v. Nazemian*¹⁰ and its measured approach to determining when translations were sufficiently reliable the translated statements could be fairly attributed to the declarant.¹¹

In *Nazemian*, the defendant was convicted of numerous drug trafficking offenses. She argued the testimony of an undercover agent relaying statements she made to the agent through a translator violated the hearsay rule as well as her constitutional right to confront witnesses against her.¹² The Ninth Circuit noted if the translated statements could be properly viewed as the defendant's own there could be neither a hearsay nor confrontation clause issue. If the translated statements could be attributed to her, they

⁷ Evidence Code section 1200 et seq.

⁸ *Correa v. Superior Court* (2002) 27 Cal.4th 444.

⁹ *Correa v. Superior Court, supra*, 27 Cal.4th 444, 448.

¹⁰ *United States v. Nazemian* (9th Cir. 1991) 948 F.2d 522.

¹¹ *Correa v. Superior Court, supra*, 27 Cal.4th 444, 457.

¹² *United States v. Nazemian, supra*, 948 F.2d 522, 524.

would constitute admissions, nonhearsay under the Federal Rules of Evidence.¹³

Similarly, if her translated statements could properly be viewed as her own there would be no confrontation clause problem because she could not claim she was denied the opportunity to confront herself.¹⁴

The *Nazemian* court considered the analyses of various decisions on the subject and determined, “[t]he better approach is to consider on a case-by-case basis whether the translated statements fairly should be considered the statements of the speaker.”¹⁵ Factors “relevant in determining whether the interpreter’s statements should be attributed to the [declarant] . . . , [include] which party supplied the interpreter, whether the interpreter had any motive to mislead or distort, the interpreter’s qualifications and language skills, and whether actions taken subsequent to the conversation were consistent with the statements as translated.”¹⁶

The California Supreme Court in *Correa* expressly adopted this approach and these factors for California courts to use in deciding whether translated out of court statements should not be considered hearsay, but statements of the speaker.¹⁷

The *Correa* court additionally observed that in many of the analyzed cases the persons who provided the translation did not always testify at trial. Thus, the court admonished ““where the particular facts of a case cast significant doubt upon the accuracy of a translated [statement], the translator or a witness who heard and understood the untranslated [statement] must be available for testimony and cross-examination at the . . . hearing before the [statement] can be admitted.””¹⁸

¹³ *United States v. Nazemian*, *supra*, 948 F.2d 522, 526, citing Federal Rules of Evidence, rule 801(d)(2)(C) or (D).

¹⁴ *United States v. Nazemian*, *supra*, 948 F.2d 522, 526.

¹⁵ *United States v. Nazemian*, *supra*, 948 F.2d 522, 527.

¹⁶ *United States v. Nazemian*, *supra*, 948 F.2d 522, 527.

¹⁷ *Correa v. Superior Court*, *supra*, 27 Cal.4th 444, 457-459.

¹⁸ *Correa v. Superior Court*, *supra*, 27 Cal.4th 444, 459, quoting *United States v. Martinez-Gaytan* (5th Cir. 2000) 213 F.3d 890, 891.

In applying these factors, the *Correa* court found the magistrate did not err in permitting the officer to testify to the translated statements.¹⁹ The translators were not supplied by the police but were apparently neutral neighbors who happened on the scene. There was no suggestion either was biased or otherwise had a motive to mislead or distort. The officer observed the translation and did not report any apparent hesitation or difficulty in communicating. The translators established their language skills and competence by testifying at the hearing. Moreover, evidence produced during the investigation tended to corroborate the substance of the translated statements.²⁰

Similarly in the case at bar, the overall circumstances indicate Caballero's translated statements can be fairly said to be Caballero's own statements. Accordingly, we conclude the trial court properly declined to find her translated statements constituted inadmissible hearsay.²¹

The law enforcement officers did not supply the interpreter. Caballero's own daughter Erica acted as her interpreter for Sheriff's Deputy Kendall the night of the incident and for Detective Reed the next day. As appellant correctly points out, Erica did not testify at trial and thus there was no direct evidence of Erica's language skills. However, Caballero herself testified Erica was fluent in both English and Spanish. Moreover, neither officer reported Erica hesitating during the translation and neither reported any apparent difficulty Erica may have had in communicating in either language. Most significantly, however, Caballero confirmed during her trial testimony

¹⁹ *Correa v. Superior Court, supra*, 27 Cal.4th 444, 467.

²⁰ *Correa v. Superior Court, supra*, 27 Cal.4th 444, 466-467.

²¹ *Correa v. Superior Court, supra*, 27 Cal.4th 444, 467 ["As a reviewing court, we must draw all legitimate inferences in favor of the implicit determination of the magistrate that the [] translators were sufficiently skilled and unbiased so that the translated statements fairly could be attributed to the declarants."].

she in fact reported to her daughters the most crucial translated information, namely, that she had received her injuries at appellant's hand.²²

In any event, the fact the translator did not testify is not dispositive. As in *Nazemian*, the fact the declarant used the translator on multiple occasions tends to demonstrate the translator was faithfully and competently translating her statements as spoken. Thus, the absence of the translator at trial is not alone sufficient to cast substantial doubt on the accuracy of the translation.

Appellant argues there is nevertheless reason to believe Erica was not a neutral translator. He argues Erica may have harbored a bias against him because she allegedly refused to translate Caballero's retraction of her accusation against him. He suggests Erica may have been trying to protect her mother, or perhaps had some other interest in blaming him for her mother's injuries. While either of these hypothetical scenarios could be true in the abstract, the record contains no suggestion whatever Erica had any particular feeling for either appellant or her mother. Moreover, there was no evidence Erica had any motive to distort the facts as relayed by her mother. Thus, the fact the translator was Caballero's daughter presents at best a speculative possibility of bias, unsupported by any evidence to create a substantial doubt about any motive she might have had to mislead or to distort the parties' statements as translated.

Had Caballero in fact stated she wanted to withdraw her accusation against appellant, and had Erica in fact deliberately chosen to ignore her mother's requests to tell the officers Caballero had falsely accused appellant, then Erica could have just told the officers herself about her mother's beating and not bothered to translate each officer's question for Caballero, wait for Caballero's response and then translate her mother's response to the officer.²³ As noted, it is significant in this case Caballero used Erica as

²² This case presents no confrontation clause issue because the declarant, Caballero, testified at trial and was subject to cross-examination. (*Crawford v. Washington* (2004) 541 U.S. 36.)

²³ See, e.g., *Kalos v. United States* (8th Cir. 1925) 9 F.2d 268 [the court found no agency relationship sufficient to impute the alleged interpreter's statements to the

her interpreter again the next day when interviewed and visited by Detective Reed. If Erica was in fact deliberately refusing to translate her retraction, Caballero could have likely solicited one of her other children living in the house to act as her interpreter instead.

Finally, events subsequent to Caballero's complaint to the officers were consistent with her statements as translated. When Deputy Kendall confronted appellant, he observed what appeared to be dried blood on the knuckles and fingers of appellant's right hand. In addition, on the day before her trial testimony, Caballero told the district attorney investigator it was in fact appellant who had hit her and inflicted her injuries. This evidence tends to corroborate the accuracy of Caballero's translated statements.

Thus, in the overall circumstances of this case we conclude it was not error for the trial court to treat the translator as a mere language conduit and find the translated statements did not constitute inadmissible hearsay.²⁴

II. APPELLANT'S SENTENCE MUST BE VACATED AND THE CAUSE REMANDED FOR RESENTENCING.

Appellant contends the trial court may have made numerous sentencing errors, and because the record does not clearly reflect the court's intentions, the matter should be remanded for resentencing. Appellant's claims have merit.

The prior conviction allegations were tried to the court in a bifurcated proceeding. The court found true the allegations appellant had suffered two prior "strike" convictions:

defendant because the "interpreter" simply did all the talking, rather than translating statements actually made by the defendant].

²⁴ *Correa v. Superior Court, supra*, 27 Cal.4th 444, 463 ["if a contemporaneously translated statement fairly may be attributed to the declarant under the particular circumstances of the case, applying the factors we have outlined, the translation does not add a layer of hearsay."].

a conviction for rape in 1991²⁵ and a conviction for assault in 1990.²⁶ The court also found true three of the four allegations appellant had served prior prison terms.²⁷

At appellant's request, the court exercised its discretion to strike one of appellant's prior "strike" convictions in the interest of justice.²⁸ The court explained his rationale at length for deciding to exercise his discretion to strike one of appellant's prior serious felony convictions for sentencing purposes. However, the court did not specify which of the two prior felony convictions he chose to strike. The court simply concluded his analysis by saying, "the court is going to grant his motion to strike one of the strikes." Thereafter, the court sentenced appellant as a second "strike" offender.

Appellant contends, and the People agree, the court's finding his 1990 conviction for assault was a prior "strike" is not supported by the evidence. A prior conviction for assault qualifies as a "strike" only if the defendant *personally* used a deadly or dangerous weapon.²⁹ In the prior case appellant pled guilty to the charge of assault with a knife. However, there was no proof, and appellant did not admit, he had *personally* used the knife in the commission of the offense. In the absence of proof appellant *personally* used the deadly weapon, the trial court erred in finding his prior assault conviction constituted a "strike" for Three Strikes sentencing purposes.

The record is unclear which prior conviction the trial court struck, and which it relied on to sentence appellant as a second "strike" offender. If the court relied on appellant's prior assault conviction the court could not sentence appellant as a second "strike" offender. If, on the other hand, the court struck appellant's assault conviction

²⁵ Section 261, subdivision (a)(2).

²⁶ Section 245, subdivision (a)(1).

²⁷ Section 667.5, subdivision (b).

²⁸ *People v. Superior Court (Romero)*, *supra*, 13 Cal.4th 497.

²⁹ Section 1192.7, subdivision (c)(23); *People v. Rodriguez* (1998) 17 Cal.4th 253, 261 [absent proof the defendant personally inflicted great bodily injury, or personally used a firearm, or personally used a dangerous or deadly weapon, a prior conviction for assault does not qualify as a prior "strike" conviction]; *Cherry v. Superior Court* (2001) 86 Cal.App.4th 1296, 1300 ["Proof of such personal use is necessary, because the defendant could have been convicted on an aider and abettor theory. . . ."].

and relied instead on his prior rape conviction to double the sentence imposed on the current offense, then appellant's sentence may well remain the same. However, because the record does not clearly reveal the court's actions or reasoning, the cause must be remanded to permit the trial court to reconsider and clarify its sentencing choices.

Appellant's sentence must be reversed and the cause remanded for resentencing for another reason as well. The court purported to impose an enhancement on appellant's current convictions for having previously suffered a serious felony conviction. Instead of the five years mandated by section 667 for this enhancement,³⁰ the court imposed a two-year enhancement instead. However, appellant's current convictions for willfully inflicting corporal injury on a co-habitant,³¹ and for assault by means of force likely to cause great bodily injury,³² do not qualify as "serious" felonies under section 1192.7, subdivision (c). Accordingly, his current convictions are not subject to the enhancements of section 667, subdivision (a) in any event. Thus, if the court intended to impose the enhancement under section 667, the two-year term was not lawfully imposed. It constitutes an unauthorized sentence, subject to correction at any time.³³

The People concede the error and agree the two-year enhancement imposed for having suffered a prior serious felony should be stricken. However, the People suggest the court may have misspoke and may instead have meant to describe the two-year

³⁰ Section 667, subdivision (a)(1) ["any person convicted of a serious felony who previously has been convicted of a serious felony . . . , shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively."].

³¹ Section 273.5, subdivision (a).

³² Section 245, subdivision (a)(1).

³³ *People v. Scott* (1994) 9 Cal.4th 331, 354 ["a sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case. Appellate courts are willing to intervene in the first instance because such error is 'clear and correctable' independent of any factual issues presented by the record at sentencing."].

enhancement as imposed for having served prior prison terms.³⁴ The record belies the People's suggestion. In this particular instance, the court expressly found two of the three prior prison term allegations he found proved were too remote. For this reason the court only imposed a single one-year enhancement for having served a prior prison term.

Accordingly, the unauthorized two-year enhancement must be reversed.

DISPOSITION

The judgment of conviction is affirmed. Appellant's sentence is vacated and the cause is remanded to the trial court for resentencing in accordance with the views expressed in this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JOHNSON, Acting P.J.

We concur:

WOODS, J.

ZELON, J.

³⁴ Section 667.5, subdivision (b).